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Of The Nature Of Law

By Walter L. Nossaman,
President, Los Angeles Bar Association

President Nossaman

TWO previous papers have dealt with the natural law concept and the consequences which it is believed would follow if the natural law theory were ever translated into practice. An endeavor will be made now to state what law is, and later to point out some respects in which lawyers can and do aid in its development. The discussion will be concerned with law other than statutory, since the sources of the latter are obvious, and lawyers, *as lawyers,* have no special part in bringing it into existence.

Oliver Wendell Holmes' definition of the law is often quoted: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (The Path of the Law, in Collected Legal Papers). Although this definition would not satisfy some legal philosophers (see Goodhart, English Contributions to the Philosophy of Law, 48 Col. L. R. 671), actual practitioners of the prophetic art to which Justice Holmes refers will find it sufficient for all practical purposes.

John Chipman Gray expresses the same idea: "The Law of the State or any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties" (The Nature and Sources of the Law, 2d ed., p. 84). In another place, Professor Gray says: "The great gain in its fundamental con-

ceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is." (*Op. cit.*, p. 94.) "The Law," says this great scholar, "is what the judges declare" (p. 283).

Blackstone considered the law to be only the evidence of pre-existing custom from time to time discovered by the judges, its "living oracles."[1] As to precedents which these sibyllists found it necessary to overturn, he says: "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined * * *." (1 Bl. Comm. 68-71.)

Echoes of this mechanistic theory of the functions of the judge are found in the opinions of as great a lawyer as John Marshall (see *Osborne v. Bank of the United States,* 9 Wheat. 738, 866), and in the writings of as discriminating a legal philosopher as Montesquieu. "The judges of the nation," he says, "are only the mouth which pronounces the words of the law; inanimate beings who can moderate neither its force nor its rigor" (De L'Esprit des Lois, Liv. XI, Ch. VI).

We regard today as somewhat curious the views of the German school of juristic writers represented by Savigny, who found the origins of the law in the *Volksgeist,* the consciousness or spirit of the people, although obviously, as Professor Gray points out (*op. cit.*, p. 90), the people are quite unfamiliar with the great bulk of the law. And the Blackstonian thesis now seems almost as quaint, although we are occasionally reminded of it when judges, seeking to rationalize their decisions, attribute them to the compelling law whose characters, like those written upon the wall of Belshazzar's palace and interpreted by Daniel, they are called on only to translate. It is the almost universally accepted view today that the law is what the courts declare it to be—not mechanically or under compulsion or the guidance of an inner light, but following a process to which logic, history,

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[1]The "discovery" theory bears an obvious relationship to natural law ideas. See Frank, A Sketch of an Influence, in Interpretations of Modern Legal Philosophies, p. 258, Note 313. See also Cardozo, The Nature of the Judicial Process, p. 131.

An Abuse:

FEDERAL INJUNCTIONS IN EVICTION ACTIONS

By Edward Clayton Jones*

Edward Clayton Jones
—By courtesy of
"Bench & Bar"

SINCE November 1, 1942, Southern California has been the subject of federal rent control. A major part of the control program has consisted of a restraint upon the eviction of tenants. That this restraint was necessary during war years is beyond controversy; whether it is needed now is an issue not germane to this discussion. The fact remains: it exists.

As all have become aware, by one process or another, the federal law has been superimposed upon our state law relating to the removal of tenants. Unless eviction is sought for one of the specifically enumerated reasons, the Housing and Rent Act of 1947, as amended, forbids any court to dispossess a tenant from controlled accommodations. The permissible reasons include, among others, non-payment of rent, owner occupancy, relative occupancy, remodeling and withdrawal from the rental market. In addition, in certain of the allowed instances, conditions precedent in the form of the notice to vacate are specified.

Since the inception of rent control, therefore, landlords feeling themselves possessed of a proper basis for eviction have served the prescribed notices and, at their maturity, filed their actions in unlawful detainer in the local courts, pleading and endeavoring to prove compliance with the federal statute. In a vast number of cases tenants have filed their answers denying their landlords' claims to have satisfied the federal law, and gone

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He is a member of the Order of Coif.

to trial. The local courts have tried these issues and rendered their judgments according to the usual judicial process.

The numbers of such actions filed and prosecuted during the past six years in the Los Angeles Municipal Court alone, are astronomical. The recent increase in the number of judges of that court and its division into two master calendars at two different locations is a direct manifestation of the volume of eviction cases.

INTERVENTION BY THE HOUSING EXPEDITER

The rent control law has always included in its enforcement aspect provisions endowing its administrator with injunction-seeking powers. This was true of the original Emergency Price Control Act of 1942; it is true of the Housing and Rent Act of 1947, as amended. In its present form the law provides that the Housing Expediter may, when he feels that a person has violated, or is about to violate, the act, seek from any court a temporary restraining order and temporary or permanent injunction against such violations.

This authority has heretofore been used by the Expediter, with a beneficial effect, for the purpose of restraining collection of rent above the legal maximum and compelling the rebate of sums already collected. It has, in rare instance, been used to restrain state courts from evicting tenants in total disregard of the federal law. This latter type of case has arisen, primarily, in provincial areas where local magistrates have permitted their localism to override their understanding of the significance of federal law and the federal war powers.

Within the past three months the Housing Expediter, in this area at least, has inaugurated a policy at complete variance with previous practice, and which is attended, it is submitted, by great public detriment. That policy consists of the practice of intervening in eviction actions filed in the local courts by invoking the legal authority to file suit for an injunction in the United States District Court. The process is accompanied by the issuance of a temporary restraining order followed by a temporary injunction pending the federal trial. Countless of such injunction suits have been initiated by the Housing Expediter to restrain cases pending in the state courts in which the plaintiff-landlord *has pleaded and avowed to prove strict conformity to*

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FEDERAL COURT CRIMINAL PRACTICE

By James M. Carter,
United States Attorney

(Continued from the November issue)

VI. MOTIONS TO DISMISS OR FOR APPROPRIATE RELIEF

James M. Carter

UNDER the new Rules, pleas of not guilty, guilty and nolo contendere are provided for. "All other pleas and demurrers and motions to quash are abolished and defenses and objections raised before trial which heretofore could have been raised by one or more of them, shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these Rules."[28] The motion shall be made before plea is entered, but by court permission, may be made within a reasonable time thereafter.[29]

The new Rules provide for motion for judgment of acquittal[30] which motion takes the place of the old motion for directed verdict. The Rule also clears a doubt existing in some Circuits, and provides that the motion for judgment of acquittal at the close of the evidence offered by the Government, if not granted, does not prevent the defendant from offering evidence.

If motion for judgment of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the verdict or after it returns a verdict of guilty, or is discharged upon disagreement. If the motion is denied and the case submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative, a motion for a new trial. If a verdict of guilty is returned, the

[28]Rule 12(a), Rules of Criminal Procedure.
[29]Rule 12 (b)(3).
[30]Rule 29, Rules of Criminal Procedure.

Court may on such motion, set aside the verdict and order a new trial or enter a judgment of acquittal. If the jury disagrees and no verdict is returned, the Court may likewise, on such motion, order a new trial or enter judgment of acquittal.[31]

To properly protect the record, the attorney for a defendant should not only make his motion for acquittal at the close of all the Government's evidence, but should renew his motion at the conclusion of all the evidence in the case. His failure to renew such a motion or to make such a motion at the close of the case does not protect his record and the Circuit Court will not review the sufficiency of the evidence unless the motion is made, or renewed, at the conclusion of the case.[31a] Circuit Courts however, will generally consider what is termed "plain error" and will on occasion treat the record as if such motion had been made at the conclusion of the case, even though the record does not properly present the question.

VII. INSTRUCTIONS

Little change is made in the new Rules on the subject of Instructions, except that the Court shall inform counsel of its proposed actions upon request for instructions prior to the arguments of the jury.[32] The jury shall be instructed, after the arguments are completed. Practice in the Federal Courts requires that instructions be filed with the Court by both sides upon the opening of the case, although specific instructions may be submitted, with the Court's permission, as the trial progresses. It is important to note that no error in connection with instructions may be assigned unless objection is made thereto before the jury retires, stating the matter of the objection and the grounds thereof. Opportunity to make such an objection shall be out of the hearing of the jury, and the purpose of the Rule is to permit the Court to correct mistakes in the instructions and thus prevent error.

VIII. JURY TRIALS AND CHALLENGES

Juries may be waived in writing with the approval of the Court and the consent of the Government.[33] The Clerk maintains mimeographed forms of Waiver which will be handed the attorney in open court upon his request.

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[31]Rule 29(b), Rules of Criminal Procedure.
[31a]*Frederick v. U. S.* (1947, CCA 9), ... F. .....; *Sheridan v. U. S.* (CCA 9), 112 F. (2d) 503; *Girson v. U. S.* (CCA 9), 88 F. (2d) 358.
[32]Rule 30, Rules of Criminal Procedure.
[33]Rule 23 of the Rules of Criminal Procedure.

Norman Sterry Reports On Costs in re Appeal Briefs

Norman S. Sterry

THE report of Norman S. Sterry to the conference of Bar Association delegates at the State Bar Convention at Santa Barbara, September 14, 1948, included the following:

As everyone knows, under Paragraph C of Rule 26, the amount which may be recovered by the successful party for printing briefs is $100.00.

Prior to the adoption of the present rules on appeal by the Judicial Council, this Committee had done some very intensive work on the proposed rules, and shortly before the presentation of the rules to the Judicial Council there was a three day conference between this Committee and the Rules Committee of the Judicial Council in San Francisco. At that time it was suggested that the limit of $100.00 be increased—if my recollection is correct to $200.00. I believe all of the members of the Judicial Council Committee were sympathetic, but it was thought inexpedient to make the change at that time. No one knew at that time how the new rules would be received and it was thought the fewer innovations of that character the better.

It is my understanding that when the original statute was enacted it was thought necessary to place a limitation on the amounts to be recovered for printing briefs, in order to discourage long briefs. I believe everyone will agree, even the lawyers that write the longest briefs—of which I have often been accused of being one—that the shorter and more concise a brief the better. I think everyone will also agree that the present limitation has not prevented unreasonably long briefs. As a matter of fact, you cannot by rule or statute make a poor brief writer write a good brief or a short and concise one.

However, the point which I wish to make is that the cost of printing briefs and their length are two entirely separate and distinct subjects and in my judgment not dependent one

upon the other. I think there are few, if any, attorneys that would write a brief longer than they think necessary merely to obtain the costs thereof. No counsel knows whether he is going to be successful. Further, the most inexperienced knows the more concise his brief the more chance he has of success.

JUDICIAL COUNCIL MAY LIMIT BRIEFS

In the next place, the Judicial Council has the power to limit the length to which any brief may be filed without permission of the court. As we all know, the Ninth Circuit Court of Appeals has such limitation, I believe of 80 pages. I do not believe the majority of judges or lawyers are in favor of such a rule in the state courts, but that question is not now before us. I am merely pointing out that if it is thought best to actually try to limit the length of briefs, it should be by direct rule and not by denying to the successful party the costs which he has been reasonably put to in successfully prosecuting or defending an appeal.

With these thoughts in mind our Committee, with the approval of the Board of Governors of the State Bar, suggested to the Judicial Council that Paragraph C of Rule 26 be amended so as to provide for the recovery of the costs incurred by the prevailing party for printing any briefs required or permitted, including any petitions for rehearing, or hearing, or answers thereto "unless otherwise ordered by the District Court of Appeal or the Supreme Court, as the case may be." In the alternative, we have suggested the amendment of the rule to permit those costs but limited to the per page cost, not exceeding 125 pages for the appellant's opening brief and for respondent's reply brief, 75 pages for appellant's reply brief, 50 pages for rehearing, or hearing, for answers thereto, and 50 pages for any supplemental brief or oral argument. We do not believe in any limitation at all for costs, except to the extent that the reviewing court shall have power to do so by order where it believes that either party has written an unreasonably long brief. But if there is to be a limitation we think it should be upon the per page cost, so that if prices continue to advance, the amount recoverable will be equally advanced and if the printing prices go down the costs will likewise go down.

Without attempting to state the matter accurately, it is my

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SHERMAN ACT AND "BIGNESS" IN BUSINESS

By Alfred Carr Ackerson

(Continued from the November issue)

Alfred Carr Ackerson
—By courtesy of
"Bench and Bar"

IN VIEW of the past decisions of the courts, it might well be asked why there should be any question of the permanency of the abuse rule at this late date. The answer cannot be positive in nature and is based upon many factors, including the elasticity of the Sherman Act to lend itself to changing conditions; the fact that those cases which have established the abuse theory have carefully limited the doctrine to situations which they concluded involved size only and in which the court, *at the time of the decision,* concluded that the existence of the power without use was not against the public interest designed to be protected by the Act; the fact that the doctrine so limited has been varied under changing facts and circumstances; the fact that just as the courts' concept of restraint of interstate commerce has expanded with our changing economy, its concept of restraint affected by the mere existence of monopoly may change; and the fact that in both past and recent cases the courts have in their decisions cast doubt on the validity of the abuse theory.

Judge Learned Hand, prior to the decision of the Supreme Court in the United States Steel case, held in United States v. Corn Products Refining Co.[12] that in his opinion, "The opinions of the Supreme Court certainly seem to indicate that it is the power and not its exercise which is the test," thus reaching an advance contrary opinion from that actually adopted by the Supreme Court in the United States Steel case.

Mr. Justice Brandeis, testifying before the Senate Committee on Interstate Commerce in 1912, stated, as a witness before that committee, that "I have considered and do consider that

[12]234 Fed. 964 (D. C. N. Y., 1916).

the proposition that mere bigness cannot be an offense against society is false * * *."

DOCTRINE OF ABUSE WELL ESTABLISHED

In spite of the apparent purpose of both Sections 1 and 2 of the Sherman Act to attack monopoly and restraint in every form, and in spite of the contrary opinion of Judge Learned Hand in the Corn Products case, as well as other seeming inconsistent opinions of the Supreme Court,[13] the doctrine of abuse would nevertheless seem to have been well established in the law of monopoly up to a very recent date.

Our most recent cases dealing with monopoly under Section 2 of the Act, however, not only cast doubt upon the validity of the so-called abuse theory, but indicate that the courts are returning to a literal interpretation of the section, which is more in line with the avowed historical purposes of the Act and with the courts' interpretation of Section 1 of the Act. The recent cases referred to are the Aluminum case,[14] the recent American Tobacco Company case,[15] and the even more recent Yellow Cab case.[16]

The language used by the court in the Aluminum Company case, at pages 427-428 of the opinion, would seem to parallel the philosophy and application of the law as applied under Section 1 of the Act. There the court stated:

> "Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it

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[13] *U. S. v. Northern Securities Co.*, 193 U. S. 197, in which the Morgan firm was enjoined from controlling two competing railroads through acquisition of stock in the two companies and where no form of violence or abuse was alleged to have shown.

[14] *U. S. v. Aluminum Co.*, 148 F. (2d) 416, 427-428 (CCA 2, 1945).

[15] *American Tobacco Co. v. U. S.*, 328 U. S. 781, 786, 808-811.

[16] *U. S. v. Yellow Cab Co.*, 91 L. Ed. 1594, decided June 23, 1947.

Silver Memories

Compiled from the Daily Journal of December, 1923
By A. Stevens Halsted, Jr., Associate Editor

A. Stevens Halsted, Jr.

J. **M. Friedlander,** City Prosecutor, has ruled that a Los Angeles City ordinance making it unlawful, without a permit, for a person to wear a mask or other disguise while on any public street is not applicable to a person disguised as Santa Claus at a children's Christmas party to be held at the Biltmore Hotel.

* * *

According to reports from Washington, Congressman **H. E. Barbour** of the Fresno district has been proposed by Senators **Hiram W. Johnson** and **Samuel M. Shortridge** as a compromise candidate for the position of United States Judge for the Southern District of California. A vacancy was created by the recent death of Judge **Oscar A. Trippet.** There are several other candidates—Judge **J. E. Wooley** of the Fresno County Superior Court bench, former Superior Court Judge **H. Z. Austin,** Superior Court Judge **Howard A. Peairs** of Bakersfield, and **William Ring,** Madera attorney.

* * *

The "Rum Treaty" between the United States and Great Britain has been signed. This act permits the American authorities to search suspected liquor smuggling vessels beyond the three-mile limit, and authorizes British passenger carrying liners to carry sealed liquor stores into American ports.

* * *

Judge **John M. York** has been chosen as Presiding Judge in the local Superior Court for the coming year. Judge York will succeed **Charles S. Crail** as Presiding Judge. Judge

Crail will take over a criminal department, the number of which has been increased to six. The following are new assignments: Judge **John W. Summerfield** will try all default divorce cases. Judge **Hartley Shaw** will handle psychopathic work two days a week and, for the remainder of the time, hear nonjury civil cases. Judge **Edwin F. Hahn** will be transferred to a criminal department. Judge **Harry R. Archbald** will take over juvenile work. Judge **C. Walter Guerin** will hear all law and motion matters in civil cases. Judge **Paul Burks** will take the Long Beach department. Judge **Carlos S. Hardy** will be relieved of criminal work and will take over nonjury civil cases.

* * *

Seven million 1924 federal income tax blanks are being mailed out by the Internal Revenue Bureau. The tax on individuals is 4% normal on the first $4,000 of net income in excess of the personal exemption and credits for dependents; 8% on the balance of net income, and 1% surtax on net incomes over $6,000.

* * *

A huge loan for relief of the starving population of Germany is being appealed for by that country. Secretary of State Hughes favors the appeal. The maximum figure that Germany would need is $70,000,000. The food credit is to be in no sense a government loan. It is to be raised from private sources in the United States and Great Britain, one-half each.

* * *

Friends of **Georgia P. Bullock,** local woman attorney, are congratulating her on her recent appointment as vice-president of the National Women Lawyers Association. Mrs. Bullock was also made a member of the committee on criminal law of which the Honorable **Mabel Walker Willebrandt,** assistant attorney general, is chairman.

* * *

At a recent meeting of the executive committee of the California Bar Association, **Joseph J. Webb** of San Francisco, chairman of the committee on incorporation of the bar, received authority to send out as an official document a pamphlet prepared by the committee to be used in the campaign for "A Self-Governing Bar."

CONDITIONAL SALE CONTRACT RESOLUTION PRESENTED AT STATE BAR CONVENTION

David S. Smith*
—By courtesy of "Bench & Bar"

NOTES on the remarks made by David S. Smith, of Los Angeles, at the State Bar Convention in Santa Barbara, in September, on Resolution No. 16 include the following:

Other states have proceeded with legislation, looking towards curing some of the ills connected with conditional sales contracts.

The State of Pennsylvania and other states have entire acts covering this type of legislation.

Resolution No. 16 was not intended to be a "cure-all" but indicated a beginning looking towards the elimination of some of the evils which presently exist in connection with this type of sale.

The phraseology of Resolution No. 16 is intended to cover circumstances wherein other legislation might be circumvented, *i.e.*, by so-called lease arrangements whereby the "lessee" becomes owner after paying rent and then some final payment. By the same token the vendor is given protection, *i.e.*, in determining whether or not he shall repossess or sue for a deficiency, he may retake the property for a period not in excess of five days during which period of time he may examine the property and determine whether or not to effect repossession by keeping same or to sue for the deficiency and return the property. This type of protection is probably most necessary in connection with the

*David S. Smith graduated from Loyola University, School of Law, in 1942. Admitted to practice January 5, 1943. He was admitted to practice in U. S. District Court, 9th Circuit, November 1, 1943. Since 1943 he has been a member of the American Bar Association and Los Angeles Bar Association. Since 1945 he has been a member of the Federal Bar Association and since 1946 a member of the Lawyers Club, Los Angeles.

In the American Bar Association he has been on the Committee for Traffic Court improvement and has been in charge thereof for the local area. In the Los Angeles Bar Association he has been on the Committee for the Criminal Defense in Federal Courts and the Small Claims Court Committee. In the Lawyers Club he has been on the Board of Governors and has been chairman of the Committee on Minimum Fees, Chairman of the Committee on The Unauthorized Practice of Law.

In 1945 he resigned as enforcement attorney for the Los Angeles District Office of the Office of Price Administration and entered the private practice of law.

sale of automotive vehicles, where the automobile many times after sale deteriorates or is intentionally caused to be deteriorated by the acts of the vendee. Mere retaking would not constitute repossession unless the vendor retained the commodity for a period in excess of five days. Where the vendor determines not to repossess, he may sue for the deficiency, attach the article in question, if appropriate for attachment, and thereby nevertheless secure himself with the benefit of the existence of the asset. However, in the case of attachment, the vendor could not fix his own resale price but on a forced sale same would be sold at the usual prevailing practice at public auction wherein the highest price under the circumstances would be obtained.

Resolution No. 16 reads as follows:

"RESOLVED that the Conference of State Bar Delegates recommend to the Board of Governors of the State Bar that legislation be proposed providing:

Section 2983, Civil Code (new). When property is sold pursuant to a plan of two or more installment payments with the right to repossess in the event of default in or breach of any covenant, where payments made exceed fifty percent (50%) of the sale price, the property may either be repossessed or suit be instituted for the balance due, but both remedies may not be resorted to.

For the purpose of giving effect to this section the following shall be deemed applicable:

(a) Sales shall include any arrangement whereby the obligor or his transferee becomes owner after making certain payments;

(b) Sale price shall be fixed in a certain monetary amount; the parties may agree that payment may be made in whole or in part by consideration other than money;

(c) Repossession shall not be deemed to be complete until five (5) days from retaking of the property; during said five (5) day period the obligee may return or tender the return of the property and thereby reserve the right to sue for the balance due. Where property is so returned, costs relating to retaking and return may not be added to the balance due.

DAVID S. SMITH, *Chairman;*

THOMAS A. ALLAN, F. A. LEONARD, JR.,
RICHARD M. LEONARD, LEE COMBS."

OF THE NATURE OF LAW

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custom, accepted standards of conduct, even the judges' own personal experiences and predilections, contribute (see Cardozo, Nature of the Judicial Process, pp. 112, 167).

Without further quotation, I shall refer to writers who, some of them with emphasis and copious illustration drawn from legal history, support this view: Pound,[2] Cardozo,[3] John Austin,[4] Sir Henry Maine,[5] Kelsen,[6] Charles Evans Hughes,[7] Theodore Roosevelt.[8]

Although statutory law is not dealt with in these papers, the *interpretation* of statutes is a judicial function by which the intent of the legislature, if it had one, is ascertained, and by which the legislative intent, if lacking, is supplied. This process is as

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[2]The Formative Era of American Law, p. 94; The Spirit of the Common Law, pp. 170-171, 214; Interpretations of Legal History, pp. 124 ff.; 133 n.

[3]The Growth of the Law, pp. 43-44; The Nature of the Judicial Process, pp. 10, 113, 115, 125-126, 137, 166, 171.

[4]2 Jur., 4th ed., p. 655, quoted in Gray, p. 222.

[5]Ancient Law (World's Classics ed.), pp. 11, 25-26.

[6]General Theory of Law and State, p. 135.

[7]"The Constitution is what the judges say it is," quoted in Jackson, The Struggle for Judicial Supremacy, p. 3, from Addresses and Papers of Charles Evans Hughes, 2d ed., pp. 185-186.

[8]43 Cong. Rec., part 1, p. 21, quoted in Cardozo, The Nature of the Judicial Process, p. 171.

fully creative as that by which the common law relating to a given subject is established and declared. As Bishop Hoadly well said over two hundred years ago: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them; *a fortiori,* whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Lawgiver." (Quoted in Gray, *op. cit., supra,* p. 102.)

Striking illustrations of judge-made law, some of it of a

purely statutory nature, readily present themselves. In this category belong the rule against perpetuities (*Duke of Norfolk's Case*, 3 Ch. Cas. 1, 53 (1685); *Stephens v. Stephens*, Cas. temp. Talb. 228 (1736)), the creation of future contingent interests by will (*Pells v. Brown*, Cro. Jac. 590 (1620); see Gray, p. 237), the Rule in Shelley's Case (1 Co. Rep. 93b, 104a (1581); see Gray, pp. 142, 294). The law merchant is a judicial adaptation of mercantile usage, and the law of equity a judicial invention whereby the law was made more responsive to moral standards (Pound, Spirit of the Common Law, pp. 184, 215). This judicial legislation has been of a high order and has contributed notably to the progress of the law.

In the next paper, I shall cite illustrations which are specific, and some of them striking, of the fact that judges must and do make and unmake law.

STERRY REPORTS RE BRIEF COSTS

(Continued from page 104)

general understanding that when the statute was first enacted placing a $50.00 limitation for briefs, the costs averaged between 50 cents and 75 cents per page. At the time of the adoption of these rules, if my recollection is correct, the costs had increased, in Los Angeles County, to between $1.00 and $1.25 per page. At the present time in Los Angeles they average about $2.50 per page.

POWER TO RETAX OR DISALLOW

It was suggested in our discussions that it should be within the power of the reviewing court to retax the costs claimed for printing briefs and to disallow or modify them wherever the court felt the briefs were too long. After due consideration we

discarded the idea for two reasons: First, we felt that the average court would be disinclined to hold that a brief was too long, even where judges individually believed it to be so. Further we felt that an undue amount of time of the Appellate and Supreme Courts would be taken up in considering such motions. The second and equally important consideration was that under our present system the costs on appeal are taxed in the Superior Court after filing of the remittitur. To enable the reviewing court to pass upon a motion to retax would require the repealing of a number of statutes which it would be difficult, if not impossible, to effect.

For these reasons we decided to abandon any direct provision in the rule authorizing the reviewing court to retax the costs of printing briefs. We think the provision "unless otherwise ordered by the District Court of Appeal or the Supreme Court, as the case may be" is sufficient.

It has been said that the suggested amendments will increase the costs of appeal. I want to emphatically point out that is not, and cannot be true. The costs of an appeal are those which

the respective parties are forced to incur to prosecute or defend an appeal, which, of course, includes the printing of all briefs that are required, or that the course of the appeal indicate are necessary and are permitted to be filed. All that the amendment would accomplish would be to enable the successful party to recover the costs he actually incurs.

Mr. Chairman I move the approval of the report of the Committee with reference to the recommended change in Subdivision C of Rule 26, and further that the conference prefers the first alternative. (The said motion was duly seconded and unanimously adopted.)

(Mr. Sterry's remarks concerning Master Calendars in courts having less than ten judges is not included here, due to its inapplicability to Los Angeles.)

An Abuse: FEDERAL INJUNCTIONS IN EVICTION ACTIONS

(Continued from page 100)

the federal law. In other words, the cases are not ones in which a landlord is attempting to proceed in patent disregard of the housing act, but are instances in which he is seeking to establish compliance in a court of law!!!

In a typical case, a landlord gave the prescribed notice seeking possession of his unit for occupancy by a relative—a basis recognized by the Housing and Rent Act. At its maturity an action in unlawful detainer was instituted. The tenant retained counsel and appeared in the Municipal Court action. Before trial the Housing Expediter filed suit for an injunction and obtained a temporary restraining order from the United States District Court. Before an adjudication can be had in the state court a complete trial must be had in the federal court.

NEEDLESS LITIGATION

The result, of course, is that a type of litigation which has always been expedited is fearfully delayed. The landlord must abate his state court action, defend the motion for the preliminary injunction in the federal court, answer the Expediter's complaint, and try the same issues before the District Court that he will one day, if successful, re-try in the abated state court action. Only then can he return to the normal procedures and prosecute for his writ of possession.

If it were a fact that the state courts in California were antagonistic to federal rent control or, as in some regions, declared a refusal to enforce the rent law, there would be ample justification for an appeal to federal courts. But the indisputable fact is that the extreme contrary is true. From the first chaotic days of the program to the present, local tribunals have steadfastly held that no eviction might be obtained without the strictest compliance with the national law. Decision following decision from the Appellate Department of the Los Angeles Superior Court has announced such a rule. One need only examine the recent splendid work of the Honorable Vernon W. Hunt to find the record upon this subject.

Any claim, therefore, that the policy adopted by the Housing Expediter is necessitated by a failure of California Courts to sustain the recent control program is totally without basis or merit. The most zealous partisan of the rent law could not criticize the position adopted by the local courts.

With this basic truth in mind a consideration of the evils of federal injunction of eviction proceedings is invited.

DOUBLE TRIALS OF SAME FACTS

Wasted motion has always been deemed an evil. From the law's abhorrence of it has sprung the doctrine of res judicata. The American system of jurisprudence directs that when issues between parties are once tried and become final, they shall not be re-litigated.

Yet in the cases under discussion precisely the opposite is accomplished. Following an injunction the United States District Court must first try the issues pending in the unlawful detainer action. Perhaps it is the good faith intention of the landlord to occupy his property; again, it may be a determination of the legal rent for his unit. If the landlord prevails, since his action was with the Housing Expediter, his judgment is unavailing in the state court. To continue his interrupted eviction suit he must again prove his case and obtain his judgment: *upon exactly the same factual issues!*

Instead of one session in court the parties—landlord and tenant alike—must leave their businesses to attend two trials plus a hearing on the temporary injunction. In place of attorneys' fees and court costs for one lawsuit, the landlord must finance federal litigation as well. The plight of counsel who

now attempts to advise his client as to the expense of an eviction is a hazardous one. In many cases, undoubtedly, the risk of the expense will deter a proper pursuit of a legal right.

SUMMARY PROCEDURE DELAYED

Our law recognizes that an action to recover possession of real property is a summary one entitled to prompt determination. To this end the time to plead to the complaint is shortened to three days and priority on the trial calendar is decreed. Normally an action in unlawful detainer can be brought to hearing from ten to fourteen days after service of process. The Congress did not deem it wise to interfere with this process in connection with rent control. Instead, that legislature, in certain instances, expanded the period of notice required and thus safeguarded the interests of tenants.

Intervention by the Expediter in eviction suits frustrates the summary nature of such actions. The collateral proceedings in the federal court will consume from thirty to ninety, or more, additional days. If it were the intention of the framers of the law to grant this delay, it would have been so declared. Thus,

further needless and unintended hardship is imposed by the Expediter's policy.

CROWDING OF FEDERAL COURTS

Without disturbing the staunchest advocates of federal supremacy, it is safe to assert that the United States District Courts are not necessary tribunals for the determination of the right to possession of apartments and flats in the City of Los Angeles. An examination of the statutes of the United States and the docket of any federal court impels the observation that those courts were designed to try issues of other types and significances. A consideration of the disparity between the relative numbers of the divisions or departments of our local Superior and Municipal Courts as opposed to the Federal District Court, indicates the same conclusion.

Yet the Housing Expediter, from motives not too clear, seeks to bring to the federal courtroom a vast horde of these purely local disputes. It is submitted that, as a federal agency, the Expediter should endeavor to lighten the federal docket, and not unnecessarily encumber it. His present policy is, and must increasingly become, an administrative obstacle to the federal judges, a harassment to federal practitioners and an impediment to federal litigants.

AFFRONT TO THE LOCAL BENCH

The position of the administrators of the rent program and their legal staffs in enjoining state jurisdiction of eviction suits is inescapably based upon a determination or assumption that the Bench of the local courts is unable or unwilling to interpret and apply the rent control law. There is no other explanation for the large-scale attempt to transplant the litigation to the federal courts.

In the vernacular of the recent political campaign, one need only "look to the record" to find the complete destruction of such a position. A day spent in the trial divisions of the Los Angeles Municipal Court will quickly convince the uninitiate that each unlawful detainer action is strictly measured against the requirements of the Housing and Rent Act.

It is submitted that it does not serve the cause of amity and harmony between our great federal and local systems of justice thus to bring the two into friction. Section 265 of the United States Judicial Code declares a policy that, except in bankruptcy

matters. the federal should not enjoin the state judiciary. The United States Supreme Court has recognized that *as an expression of policy,* that section applies to injunctions in the rent control field. The present, needless program of the Housing Expediter is a violation of that policy.

SOCIALIZED LAW

It is of more than personal interest to the Bar that the administrator of the rent control program supplies free legal representation to defendants in eviction actions. In cases where the injunction is employed, the tenant is defended by the legal department of the Office of the Housing Expediter. If counsel were retained in connection with the state action, their services are supplanted unless, after trial, the Expediter fails in his suit.

It has not been claimed that any attempt is made to limit such representation to cases of indigent tenants. At any rate, such litigants are admirably served by the Legal Aid Foundation of this city.

No defense of this practice can be predicated upon the argument that it constitutes a legitimate prosecution of criminal acts. No crime, under the Housing and Rent Act, has been demonstrated until a court has passed judgment upon the merits of the allegations in the landlord's unlawful detainer complaint. It is purely and simply intervention by the Expediter in private civil litigation in which an adequate defense can be maintained by private counsel already employed or easily obtainable.

CONCLUSION

It is submitted that a powerful enforcement weapon which has been entrusted by the Congress is being abused by the Housing Expediter to enjoin eviction actions which can be, and are being, properly administered and controlled in the California courts. It would seem that the frequent charge that government bureaus and administrative agencies inevitably come to overreach their intended function, is substantiated in this instance.

There are at least two channels for correction of the abuse. First, the local offices of the Housing Expediter may be instructed by the national office to refrain from the objectionable practices. Second, the United States District Courts may, in the exercise of their equity jurisprudence, deny both temporary and permanent relief in such cases. The first will only result from the protests of those interested; the second, from diligent advocacy in the federal courts.

FEDERAL COURT CRIMINAL PRACTICE

(Continued from page 102)

Although Rule 24 of the Rules of Criminal Procedure provides that counsel for the prosecution and defense may be permitted to conduct the examination of prospective jurors, or that the Court may itself conduct the examination,[34] it is the practice of most Judges in this District Court to conduct the examination. Counsel are permitted to submit questions to the Court which they desire propounded to prospective jurors.

The number of peremptory challenges permissible is twenty to either side in an offense punishable by death. For other felonies the Government is entitled to six and the defendant or defendants jointly to ten peremptory challenges. In misdemeanor cases, each side is permitted three. Where there is more than one defendant, the rule permits the Court to allow the defendants additional peremptory challenges to be used either separately or jointly in the discretion of the Court. The Government is not allowed extra challenges.

No provision is made by the statute or by the Rules of Criminal Procedure for the method or order of the exercise of peremptory challenges.[35]

Because in felony cases the defense has an excess of challenges over the prosecution, the better practice and one followed by the majority of the Judges in our District Courts is to require the defense to exercise two challenges to the Government's one until such time as the challenges are equal. This was the old rule of this District Court.[36]

IX. PROCEDURE AND EVIDENCE

Contrary to the practice on the civil side where the conformity statute makes the State rules of evidence and procedure applicable in the Federal Courts; on the criminal side the rule is to the contrary.

> "Federal criminal procedure is governed not by State practice but by Federal statutes and decisions of the Federal Courts."[37]

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[34]Rule 24 of the Rules of Criminal Procedure.

[35]See "Procedure for Exercising Peremptory Challenges in Selecting Juries in Federal Court" by James M. Carter, LOS ANGELES BAR BULLETIN, Vol. 21, No. 4, Dec. 1945.

[36]Rule 51 of "Rules of Practice of the U. S. District Court"; repealed Jan. 15, 1944, upon the effective date of the new District Court Rules.

[37]*U. S. v. Murdock* (1931), 284 U. S. 141, at 150; 76 L. Ed. 210; 52 Sup. Ct. 63; 82 A. L. R. 1376. Also *Rosen v. U. S.*, 245 U. S. 467; *Funk v U. S.*, 290 U. S. 371; *U. S. v. Aviles* (D. C.), 227 Fed. 474.

Rules of evidence in criminal cases are not controlled by local statute, but by common law principles as applied by the Federal Courts. The Supreme Court stated in 1933:

> "During the present term this Court has resolved conflicting views expressed in its earlier opinions by holding that the rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk v. United States*, 290 U. S. 371. If any different rule with respect to the admissibility of testimony has been thought to apply in the federal courts, Wigmore on Evidence, 2d ed., §6; compare *Alford v. United States*, 282 U. S. 687, it is clear that it should be the same as that governing the competence of witnesses. So our decision here, in the absence of Congressional legislation on the subject, is to be controlled by common law principles, not by local Statute."[38]

In the *McNabb* case (1943) the Supreme Court said:

> "The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone v. United States*, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions, *e.g., Ex Parte Bollman & Swartwout*, 4 Cranch. 75, 130-31; *United States v. Palmer*, 3 Wheat. 610, 643-44; *United States v. Furlong*, 5 Wheat. 184, 199; *United States v. Gooding*, 12 Wheat. 460, 468-70; *United States v. Wood*, 14 Pet. 430; *United States v. Murphy*, 16 Pet. 203; *Funk v. United States*, 290 U. S. 371; *Wolfle v. United States*, 291 U. S. 7; see 1 Wigmore on Evidence (3d ed. 1940), pp. 170-97; Note, 47 Harv. L. Rev. 853. And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."[39]

This rule should cause the practitioner little concern since the Federal rules of evidence are, by and large, very similar to the rules of evidence that apply in the State courts.

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[38] *Wolfle v. U. S.*, 291 U. S. 7, at p. 12 (1933); 78 L. Ed. 617; 54 Sup. Ct. 279.

[39] *McNabb v. U. S.* (1943), 318 U. S. 332, at 341.

A series of statutory enactments concerning the admissibility of evidence should be familiar to every practitioner. They appear in Revised Title 28, U. S. Code, and are as follows:

Section 1733 makes admissible evidence copies of books, records of accounts or minutes of proceedings of any department or agency of the United States. Properly authenticated copies of such records are admissible in evidence equally with the originals. The seals of the federal agencies are judicially noticed without statutory mandate.[40]

Section 1738 makes admissible the record of evidence of legislative acts and judicial proceedings of States, territories or possessions of the United States. Section 1739 concerns the admissibility of records in offices not pertaining to courts and permits the admission of duly authenticated copies of such records (as contrasted with certified copies).

Section 1732 is the "Business Entry Statute" and makes admissible any writing or record, entry, memorandum, where it appears it was made in the regular course of business and that

[40] *Gardner v. Barney* (1867), 73 U. S. 499.

it was the regular course of business to make such memorandum of record. All other circumstances concern only the weight and not the admissibility of the document, and the term "business" includes business, profession, occupation and calling of every kind.

Confessions obtained after arrest of the defendant, and where unreasonable delay occurred prior to his arraignment before a magistrate have been held inadmissible and in violation of defendant's rights under the constitution.[41]

But the mere questioning of a suspect, while in the custody of a law officer, is not prohibited.[42] Nor does the mere fact that a confession so made while the defendant was in the custody of police render it inadmissible without further showing.[43] Nor does a subsequent illegal detention after the making of a confession retroactively make that confession illegal or inadmissible.[44]

(For "Sentences—Probation—Parole," see next issue)

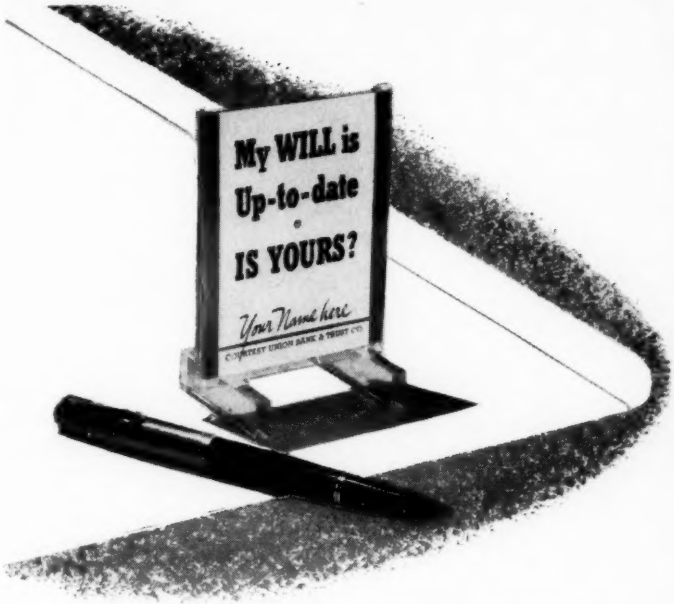
[41]*McNabb v. U. S.*, 318 U. S. 332; *Anderson v. U. S.*, 318 U. S. 350; *Gros v. U. S.* (CCA 9), 136 Fed. (2d) 878; *Runnels v. U. S.* (CCA 9, 1943), 138 Fed. (2d) 346.
[42]*Lyons v. Oklahoma* (1944), 322 U. S. 596; *Lisenba v. California*, 314 U. S. 219, at 239, 241.
[43]*McNabb v. U. S.*, 318 U. S. 332, at 346.
[44]*U. S. v. Mitchell* (1944), 322 U. S. 65. Rehear. den. 322 U. S. 770.

SHERMAN ACT—"BIGNESS" IN BUSINESS

(Continued from page 106)

> would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies."

In the American Tobacco case, the reasoning of the court also falls in line with the decisions and the law as it has been expounded under Section 1 of the Act. In its opinion, at page 810, the court, speaking through Mr. Justice Burton, came to the unequivocal conclusion that "neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain the charge of monopolization under the Sherman Act." An examination of the reasoning in the latter case (pages 786, 808-811) would seem to indicate very clearly that the court has not only brought the interpretation of the two sections of the Act closer together, but has expressly reached its conclusion with respect to the application of Section 2 of the Act on the basis of decisions



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interpreting Section 1, without distinguishing between the two types of cases.

YELLOW CAB DECISION

The same thing may be said of the decision by Mr. Justice Murphy in the Yellow Cab Co. case. There the court states:

> "Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of commerce affected. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, note 59, p. 225, 84 L. Ed. 1129, 1170, 60 S. Ct. 861; Apex Hosiery Co. v. Leader, 310 U. S. 469, 485, 84 L. Ed. 1311, 1317, 60 S. Ct. 982, 128 A. L. R. 1044. And Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce, without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. The complaint in this case deals with interstate purchases of replacements of some 5,000 licensed taxicabs in four cities. That is an appreciable amount of commerce under any standard. See W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. Ed. 608, 24 S. Ct. 307.
>
> "Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstacles so that the statutory policy of free trade might be effectively achieved.
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> * * * * * * *
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> "Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."

(To be concluded in the January issue)